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In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL POWER COMMISSION, PETITIONER

v.

SIERRA PACIFIC POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Reasons for granting the writ	9
Conclusion	11
Appendix A	1a
Appendix B	12a

CITATIONS

Cases:

Mobile Gas Service Corporation v. *Federal Power Commission*, 215 F. 2d 883, certiorari granted, Nos. 436, 556, this Term 8, 9–10

Statutes:

Federal Power Act, 49 Stat. 838, 16 U. S. C. 791a, *et seq.*:

- Section 205 (c) 12a
- Section 205 (d) 12a
- Section 205 (e) 4, 10, 13a
- Section 206 (a) 8, 14a

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The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cause on February 24, 1955, as modified on March 23, 1955.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A; *infra*, pp. 1a–10a) is not yet reported.

JURISDICTION

The original judgment of the Court of Appeals was entered on February 24, 1955 (App. A, *infra*, p. 10a). Thereafter, on the motion of Sierra Pacific Power Company, the Court of Appeals modi-

fied its judgment on March 23, 1955 (App. A, *infra*, p. 11a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 313 (b) of the Federal Power Act.

QUESTION PRESENTED

Whether, under the Federal Power Act, the Federal Power Commission may permit a schedule increasing a public utility's rate for the sale in interstate commerce of electric energy for resale to be filed, become effective, and supersede the existing filed rate upon a finding after full hearing that the increased rate is not unlawful, but without a finding as to the existing rate which the purchaser had contracted for and had not agreed to increase.

STATUTE INVOLVED

The pertinent provisions of the Federal Power Act, 49 Stat. 838, 16 U. S. C. 791a, *et seq.*, are set out in Appendix B, *infra*, pp. 12a–14a.

STATEMENT

On February 2, 1953, Pacific Gas and Electric Company (P G & E) filed with the Federal Power Commission, pursuant to Section 205 (d) of the Federal Power Act, App. B, *infra*, pp. 12a–13a, a supplement to its Rate Schedule FPC No. 3, proposing to increase its rate for sales of electric energy to Sierra Pacific Power Company for resale by about 28%, or an estimated $419,400

for 1953 (R. 443).[1] The proposed supplement, which P G & E requested be effective April 6, 1953, sought to substitute increased demand and energy rates for those theretofore used in billing Sierra for approximately 40,000 kw of firm power purchased from P G & E under an agreement entered into on March 4, 1948, for a period of at least fifteen years (R. 428–430, 444).[2]

In response to the Commission's request for comments, Sierra objected to the increase as unreasonable and unjust and claimed that the 1948 contract rate satisfied the standards prescribed in the Power Act (R. 432).[4] Thereafter, on March

[1] The Commission found, without objection, that the sale was in interstate commerce for resale, within the Commission's jurisdiction to regulate (R. 467–468).

[2] The proposed charges and those to be superseded are similar to P G & E's schedules "R" and "P-31", respectively, filed with the California Public Utilities Commission. The former superseded the latter as the rate generally available for intrastate service to resale customers with no generating facilities of their own, and purchasing only from P G & E (R. 444).

[3] The proposed supplemental rate schedule would have left unaltered the other terms of the 1948 agreement, including (1) a provision that Sierra purchase from P G & E 4,000 kw of standby capacity for hydroelectric plants maintained on its system, (2) the fifteen year term provision, (3) a minimum bill provision, and (4) a provision preventing Sierra from building additional generating facilities or from obtaining additional energy from any source other than P G & E (R. 444).

[4] The California Public Utilities Commission refused to comment since a similar application filed by P G & E was then pending before it. The Nevada Public Utility Commission opposed the increase because of the contrac-

13, 1953, the Commission, as authorized by Section 205 (e) of the Power Act, App. B., *infra*, pp. 13a–14a, suspended the proposed increase until September 6, 1953, five months after April 6, 1953, the effective day requested by P G & E, and set the proposal down for hearing (R. 431–434). Subsequently, when the Commission was unable to reach its decision by September 6, the proposed increase became effective, as provided in Section 205 (e) of the Power Act, App. B., *infra*, pp. 13a–14a. However, as further authorized by that Section, the Commission on September 28, 1953, directed P G & E to put into a special reserve the difference between the two rates, subject to refund should the Commission find any portion of the increased rate to be unjustified (R. 440–442).

Meanwhile, Sierra petitioned for leave to intervene in the proceeding and also requested the Commission to reject the proposed supplement as improperly filed on the ground that contract rights may not be changed under the rate filing and suspension provisions of Section 205 of the Power Act (R. 445). The Commission permitted Sierra to intervene but denied the request that the supplement be rejected—without prejudice, however, to Sierra's right thereafter to press these contentions (R. 445–446).[5]

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tual arrangement between P G & E and Sierra and requested a hearing (R. 432, 435–437).

[5] Sierra's petition for rehearing on this denial was dismissed because it related only to an interlocutory and pro-

At the hearing, Sierra renewed its contentions that the proposed supplement should be rejected as an unauthorized attempt to alter contract rights. In addition, it urged the Commission to find the 1948 contract rate reasonable and the proposed increase unreasonable. It claimed that it had given up opportunities to meet its power requirements from other sources, notably from the United States Bureau of Reclamation, in reliance upon the binding effect of all terms of the 1948 agreement, and consequently that to change the rate and leave the other provisions of the 1948 contract unaltered would be grossly unfair (R. 450).

In its opinion and order, entered after oral argument followed by further hearings and argument,[8] the Commission pointed out that "on each of the several previous occasions * * * we have rejected any contention that an abrogation of contract rights may not be worked by the operation of the statutory rate filing and suspension provisions" (R. 458–459). Stating that "even a cursory examination will show that the provisions of Section 205 expressly authorize the alteration of contracts" (R. 461), the Commission went on to rule that the filed rate procedure provided in Section 205 imposed no requirement that the old

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cedural ruling, not a final decision by the Commission (R. 446).

[8] By agreement, the intermediate decision procedure was omitted (R. 446).

contract rate must be found unlawful before a new rate can take effect (R. 462):

> * * * There is nothing in that section that qualifies or limits the right and duty placed upon the seller to maintain rates which satisfy the statutory standard by any requirement for the consent of the buyer or for a Commission finding with respect to the former contract rate. The sole condition is that the filed rate may not become effective in less than 30 days (unless the Commission otherwise orders) and the Commission may suspend any filing and prescribe a rate in lieu thereof if, after hearing, it finds that the changed rate proposed by the suspended filing is unlawful.[7]

As to the reasonableness of the proposed rate, the Commission refused to depart from the cost-of-service method it usually followed in such situations (R. 450). It found "unconvincing" Sierra's claim that it had foregone other sources of supply in reliance upon the continuance of all terms of the 1948 agreement since "the record * * * clearly shows that in 1948 Sierra regarded the other sources of supply as being so unacceptable that P. G & E became, in fact, the only feasible source"

[7] In this connection, the Commission noted that "if a finding on the lawfulness of the 1948 contract rate were necessary or appropriate, on the record before us that finding would have to be that the 1948 rate is unreasonably low and therefore unlawful" (R. 464).

(R. 451).[8] In addition, the Commission, relying on the principle that a public utility cannot by contract place its rates beyond the reach of regulation, rejected Sierra's argument that the competitive aspects of the 1948 negotiations necessarily made the negotiated rate just and reasonable (R. 451). Finally, it noted that even if it accepted the 1948 contract as demonstrating the rate of return reasonable for Sierra's business, "due to the increases in other costs which have occurred since then the presently proposed increase will merely restore that rate of return, not go above it" (R. 452).[9] Consequently, since it was of the opinion that the proposed rate would provide no more than a fair return on the portion of P G & E's net investment rate base properly allocable to that service (R. 469),[10] the Commis-

[8] In regard to Sierra's contention that it would be grossly unfair to change the 1948 rate and leave all other terms unaltered, the Commission said that "Sierra has not shown, and on cross examination its president could not suggest any alterations which he thought should be made in other terms if the rate were changed as proposed" (R. 451).

[9] Using P G & E's method of computing the rate of return which would result from the revenues produced by the proposed rates and applying it to the revenues which were anticipated under the 1948 contract at the time it was entered into, the Commission determined that there was no substantial difference between the reasonably foreseeable rates of return (R. 452–453).

[10] Although 5½% is generally a reasonable rate of return on P G & E's electric utility business, and the proposed rate would under the Commission's computation result

sion concluded that the proposed rate was not unlawful and terminated the proceeding (R. 470).[11]

Sierra sought review of the Commission's order in the court below. That court held that, where a public utility seeks unilaterally to raise a rate filed with the Commission in contract form, there must be a Commission finding under Section 206 (App. B, *infra*, p. 14a) that the existing rate is unjust or unreasonable before the new rate may be permitted to become effective (App. A, *infra*, pp. 4a–9a). Since the Commission had not found the 1948 contract rate to be unreasonable, the court set the order aside and remanded the case to the Commission with instructions to dismiss the proceeding entirely or for further proceedings in the same case under Section 206 (a) (App. A, *infra*, pp. 9a–10a). In so holding, the court placed primary reliance upon the reasoning and the materials cited, as well as the ruling, in *Mobile Gas Service Corporation* v. *Federal Power Commission*, 215 F. 2d 883 (C. A. 3) (App. A, *infra*, pp. 6a–8a), certiorari granted, Nos. 436, 556, this

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in a 4.75% return, the Commission did not regard the 0.75% deficiency as a basis for rejecting the proposed rate in view of P G & E's willingness to absorb the deficiency (R. 464–465).

[11] Two Commissioners dissented on the ground that, in the circumstances, the proposed rate was unreasonable and the 1948 contract rate should be continued because not unjust, unreasonable, or unduly discriminatory (R. 471–477).

Term. On March 23, 1955, the court modified its order by deleting the permission to continue the present case with further proceedings under Section 206 (a) (App. A, *infra*, p. 11a) so that the Commission is now required to dismiss the case and start anew.[12]

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals for the District of Columbia Circuit presents substantially the same question under the Federal Power Act as is raised by the decision of the Court of Appeals for the Third Circuit in *Mobile Gas Service Corp* v. *Federal Power Commission*, 215 F. 2d 883, in regard to the Natural Gas Act, *i. e.*, the proper procedure to be followed by the Federal Power Commission when a public utility or natural gas company seeks to increase its rates to a purchaser for resale where the existing rate is embodied in a contract and the purchaser has not consented to the increase. In *Mobile*, the Third Circuit held that the filed rate procedure provided by Section 4 of the Natural Gas Act is inapplicable in such a situation and that the rate increase may be allowed only after a Commission determination, made after hearing, under Section 5 of the Gas Act that the existing rate is unjust and unreasonable. Relying primarily on the

[12] The effect of the modification, if upheld, is to nullify the challenged rate increase, to reinstate the 1948 rate, and in effect to require the excess over the 1948 rate collected by P G & E to be paid over to Sierra.

Third Circuit's holding and reasoning in *Mobile*, the District of Columbia Circuit entered similar rulings in the instant case with regard to comparable provisions (Sections 205, 206) of the Federal Power Act.

This Court has already granted the Commission's petition for a writ of certiorari in *Mobile*, No. 556, this Term. See also *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, No. 436, this Term. The reasons for granting the writ set out in the Commission's petition in that case (at pp. 6–24) are applicable in the instant case and are incorporated herein by reference. In addition, the superficial inequity which apparently underlay the *Mobile* holding[13] is not present here. For, as authorized by Section 205 (e) of the Power Act (App. B, *infra*, pp. 13a–14a), the Commission, pending the outcome of the hearing, suspended the proposed increase for five months, and thereafter permitted the increase to become effective, subject to refund should any part of the increase be found to be unreasonable. Also, the Commis-

[13] As pointed out in the petition in No. 556 (at pp. 20–23), this superficial inequity may be more fanciful than real. Moreover, under the scheme adopted by Congress for allocating the losses necessarily incident to the time needed for rate investigations, the burden imposed on a purchaser of gas for industrial resale by the prohibition against suspension of the increased rate pending the completion of the administrative hearing was roughly balanced by the loss incurred by the gas company in connection with the suspension of its rate increases for sales for resale for other uses.

sion has here completed a full hearing as a result of which it has found that the proposed increase was reasonable. Consequently, unlike *Mobile*, Sierra has affirmatively benefited from the filed rate procedure; not only was the cost of the increase, which Sierra bore during a portion of the period of the administrative proceeding, subject to adjustment were the Commission ultimately to find any part of the increase unreasonable, but also Sierra was relieved of paying the increase entirely during the five-month period of suspension despite the Commission's ultimate finding that the increase was reasonable.

CONCLUSION

For the foregoing reasons, as well as those set out in the Commission's petition in No. 556, this petition for a writ of certiorari should be granted. Since the present petition involves the Federal Power Act and No. 556 involves another statute, the Natural Gas Act, and since the posture of the instant case is different from that in No. 556, we believe that the petition should not be held pending disposition of No. 556, but that it should be granted and separate argument had.

Respectfully submitted,

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APRIL 1955.